Supreme Court, U.S.
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NO. 95-1195

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CHERYL M. PELOQUIN,

Petitioner,

vs.

UNITED OF OMAHA LIFE INSURANCE COMPANY, a Nebraska corporation,

Respondent.

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA, IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. CONCERNING RESPONDENT'S ARGUMENT THAT THE DISTRICT COURT OF APPEAL WAS NOT "THE HIGHEST COURT" OF FLORIDA "IN WHICH A DECISION COULD BE HAD"

Respondent's contention that the Petitioner did not exhaust her state appellate remedies because there was a mechanism in place permitting application for review in the Florida Supreme Court is misconceived and without merit. Since codification of the rules respecting application to the Florida Supreme Court for certiorari, the Court's power to grant certiorari has been limited. In Robinson v. State, 132 So.2d 3 (Fla. 1961) the Court stated:

> [T]his Court no longer has extensive power to issue so called "common law writs of certiorari" to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts, by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts of Appeal are endowed with powers of review

limited to a determination of whether the judgment constitutes a deviation from the essential requirements of law. In a general way, this is the type of so-called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957.

II. CONCERNING MISREPRESENTATIONS OF FACT CONTAINED IN RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent's severally repeated assertion, made without citation to the record, that the Petitioner requested the trial court to apply a de novo standard of review is false, misleading, and without basis. As stated at page 5-6 of the Petition, the issue of the standard of review to be applied in the trial court was not directly raised or addressed by either party in the trial court proceedings.

2. Respondent's oft repeated assertion that the trial court applied a de novo standard of review is misconceived and illogically speculative. The court's

holding that there was no proper basis for the administrator's denial of benefits implicated application of an arbitrary and capricious standard of review. A decision without proper basis is necessarily arbitrary and capriciously rendered. At all events, the presumption of correctness mandates a holding that the proper standard of review was applied by the trial court.

3. Respondent's statement that the Petitioner was receiving medical care for the condition of endometriosis at the time the insurance contract was issued constitutes a distortion of the facts. Firstly, the record discloses that the parties stipulated that any diagnostic test and/or medicine taken (the so called "treatment") prior to the effective date of the policy was for abdominal pain, and not endometriosis. (T. October 28, 1993, page 7, line

23-25) R.218-220). Secondly, as the trial court found, abdominal pain could not, without more, be equated with endometriosis. Most importantly, the evidence which the Respondent alleges:

> ...demonstrated that PELOQUIN's condition was present at all relevant times and was the cause for which she was receiving ongoing treatment and diagnosis at the time she had submitted an application to UNITED for coverage (Brief in Opposition, page 5, second paragraph).

was evidence which was acquired after the final denial of benefits and which neither the trial court nor the appellate court could properly have factored into the calculus of their respective decisions, not being evidence which the plan administrator had before him/her at the time of making the denial.[1]

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[1] Review of a Plan Administrator's denial is limited to the evidence which the Plan Administrator had before him at the time the decision was made. Jett v. Blue Cross & Blue Shield of Alabama, 890

III. CONCERNING RESPONDENT'S STATEMENT THAT "THE STANDARD OF REVIEW IS IRRELEVANT TO THE ACTUAL DETERMINATION"

1. It cannot properly be contended that the standard of review to be applied was a matter of no consequence in the trial court. The standard of review is always relevant in reviewing an Administrator's denial of benefits.

2. In the case sub judicia the standard of review required by law to be applied was the arbitrary and capricious standard. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103, L.Ed.2d 80 (1989). As stated in II (2) above, the trial judges's arguments in support of his findings indicated that he applied the 'arbitrary and capricious'

F.2d 1137(11th Cir. 1990).

standard of review. [2] At all events, in accordance with the presumption of correctness, it must be so presumed. Based upon the findings of fact which the trial Judge made, and the standard of review which he presumably (and apparently) applied, the reviewing court could properly have reversed his decision only if there was an abuse of discretion. Determination of the standard of review applied by the trial court was therefore a necessary step in the review proceedings in the court of

[2] The judge stated:

> Look, you applied for an insurance policy, filled in your application. You put that you had headaches, you take aspirin for them, and then two years later they find a brain tumor ... why would [the insurance company] not be in a position to say, "wait a second. He had those headaches ... before we wrote this policy ... and now he wants us to pay off because he got a tumor in his brain. He should have known. He had headaches. (Record Vol. 4, Transcript of Proceedings taken on December 2, 1993, page 23)

appeal. Arguendo, had the trial judge mistakenly applied a de novo standard of review, then having regard to the findings of fact which he made, his decision must necessarily and inevitably have been the same, that is, that the Plan Administrator's denial of benefits was wrong.

Respectfully submitted,

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